United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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76-2032

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD DAVID,

Appellant,

-against-

J. W. PATTERSON, Superintendent, Eastern New York Correctional Facility,

Appellee.

Docket No. 76-2032

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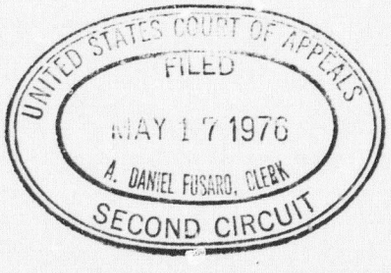
P/S

BRIEF FOR APPELLANT
RICHARD DAVID

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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Question Presented

Whether since a security guard for the City College of New York is a governmental employee engaged in law enforcement who is therefore required to furnish Miranda warnings before conducting custodial interrogation, the absence of those warnings mandates suppression of appellant's admissions.

STATEMENT PURSUANT TO RULE 28(3)(a)

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Southern District of New York (The Honorable Inzer B. Wyatt) entered on November 19, 1975, denying without a hearing appellant's petition for a writ of habeas corpus.

On March 25 , 1976, this Court granted a certificate of probable cause and leave to appeal in forma pauperis, and assigned the Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

I. Introduction

On October 20, 1971, appellant was arrested by several security guards from the City College of New York on suspicion of an attempted robbery. Appellant was handcuffed by the officers and brought to the College's security office where, following interrogation without receipt of Miranda warnings, he made an inculpatory statement. Soon thereafter, appellant was brought to the police where, following Miranda warnings, a subsequent admission occurred. Although the alleged victim of the attempted robbery never identified

appellant as the culprit, appellant was indicted and brought to trial. At trial, the People introduced, over objection, the statements made to the C.C.N.Y. security officer and the police. Found guilty of attempted robbery appellant appealed, alleging, inter alia, that the statement to the security guard was obtained in violation of his Fifth Amendment rights. After a remand for a new voluntariness hearing on the statement to the police officer (but not the C.C.N.Y. guard) the judgment was affirmed by the Appellate Division, and leave to appeal to the Court of Appeals was denied.

Appellant subsequently petitioned the district court for a writ of habeas corpus, alleging that his statement to the security officers was involuntary and illegal, since no Miranda warnings were given. The Court denied appellant's application, ruling that, irrespective of whether the security officers were required to furnish Miranda warnings, the "independent evidence" of guilt was overwhelming, and the error, if any, was harmless.

II. The Trial

Prior to trial, the People failed to disclose any statements made by appellant. Nevertheless, appellant moved to suppress any statements and a hearing was held to determine the admissibility of appellant's statements to detective John Sullivan of the New York City Police Department. Following the hearing appellant proceeded to trial, before

the Honorable James J. Leff[illegible] a jury.[1]

A. The People's Opening Statement

In his opening remarks to the jury, the district attorney disclosed that:

> The defendant was brought to the security guards' office at C.C.N.Y., for the purpose of taking names and addresses, his and the name and address of the victim, at which time the defendant said to Mr. Barcene, [a C.C.N.Y. policeman] and, of course, the law doesn't permit the entire conversation to be admitted into evidence, but that portion which is permitted, the defendant said to him --
>
> MR. ZUCKERMAN [defense counsel]: May I object at this moment, if your Honor pleases. We intend to make motion in connection with this outside the presence of the jury.
>
> (72)[2]

The Court overruled defense counsel's objection (73), and the District Attorney continued by claiming that appellant told the security officer , "I've been lucky until this one. I haven't been caught until this one" (73).

B. The People's Case

At about 6:30 p.m., on October 20, 1971, Jack Schaffer, a 25 year-old divinity student, was walking on St. Nicholas Terrace near 128th Street (79-82, 108).[3] Schaffer had stop-

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1 The Court refused to hold a suppression hearing with respect to the weapon removed from appellant by the C.C.N.Y. security officers, holding they were private individuals (8-11). At the Huntley hearing the Court restricted examination of the officer soley to the question of whether he had given appellant Miranda warnings and precluded inquiry on the nature of the statements and the surrounding circumstances (19-25).

2 Numbers in parentheses refer to transcript of State trial.

3 St. Nicholas Terrace is parallel to and a block from St. Nicholas Avenue (82).

ped at a mailbox near the corner when two men approached him and asked for a cigarette (84); Schaffer told them he didn't have one (85). As he began walking south, Schaffer sensed the two men were following him; he stepped quickly backward, and the pair ended up just in front of him (85). One of the two men pulled a knife, ordered Schaffer into a doorway ten feet away and directed him to hand over his money (85-86). Schaffer faced the two men, whose backs were to the street (86). As Schaffer reached into his pocket, the man holding the knife put it away. Schaffer pushed the two men apart, and escaped down St. Nicholas Terrace. He stopped running when he saw his attackers proceeding in the opposite direction (86). No money was taken from Schaffer (91).

Soon thereafter, a car carrying five security guards from the City College of New York pulled up (87-92). Three of the guards, John Mitchell, Harry Murray and Arion Barcene, testified at trial. Officer John Mitchell stated that his duties as a security guard were to protect life and property at the College. He was employed directly by the College (136-137). The Police Department gives the C.C.N.Y. Security Office rules and regulations governing the officers' conduct (137). The police receive an oral report of an incident such as the one in question (140). Here, the police were given a report approximately twenty minutes after the incident (139).

Mitchell and Murray testified that prior to approaching Schaffer, they and other officers were in a car heading south. They saw Schaffer walking on the Terrace (Mitchell, 124-125, Murray, 173-174). According to Mitchell, there were two black men about ten feet away from Schaffer on a stoop walking north toward Schaffer (125-126).[4]

When the officers drove up to Schaffer they asked whether the two men had tried to rob him. Schaffer responded affirmatively and was directed to get into the car (87, 92).

From this point on, Schaffer and the officers gave vastly different accounts of the events which followed his entry into the police car. According to Schaffer, the auto carried him and all five of the guards and proceeded south on St. Nicholas Terrace, east on 127th Street, and then north on St. Nicholas Avenue (87). As the car turned right on 128th Street, two pedestrians who were walking eastbound came into view (88). The driver slammed on his brakes and then, as the guards climbed out of their unmarked car, the two men on foot began to run back toward St. Nicholas Avenue (88).

Contradicting Schaffer's testimony, the officers asserted that two of their number, Murray and Barcene, immediately got out of the car and gave chase to the two suspects (Mitchell, 127-128; Murray, 176, 194). There were other people in the area, and Murray took his eyes off the two men as he got out of the car and the suspects turned the corner to go

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4 In contrast, according to Murray, Schaffer was first seen walking south, in the opposite direction from the two black men (175, 193).

to the walkway between the Avenue and the Terrace (177-178, 195). When Murray reached the walkway, he saw two men who he said were the same two he had earlier chased and lost, alone, some thirty or forty feet away (178-180, 200, 210).

Meanwhile, Schaffer, Mitchell and the other officers allegedly proceeded in the car down the Terrace, turned left on 127th Street, and left again up St. Nicholas Avenue, where Mitchell saw Murray and Barcene chasing two suspects (128-129). The car screeched to a halt at 128th Street and St. Nicholas Avenue (130-131, 152). Mitchell watched one of the suspects hide behind a parked car, but neither he nor any of the other officers made an effort to find or pursue him (131, 153). The other man, according to Murray the same person he had seen on St. Nicholas Terrace, ran into a building ahead of Murray and Barcene (131, 179-180). Security Officer Barcene arrested and handcuffed appellant after finding him stooped down in the hallway into which he had been chased (182, 215). The two guards brought appellant out of the building, placed him "in custody" and frisked him, finding a knife later introduced into evidence (131-134, 183, 221-222).[5]

The officers immediately brought appellant, in handcuffs, back to Schaffer (88). However, Schaffer was unable,

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5 At the preliminary hearing, Mitchell's account of events was substantially different. There, Mitchell claimed that he had gone into the building, found appellant on the roof, and arrested and disarmed him (160-161).

at that or at any time thereafter, to identify appellant as the man who had attempted to rob him (89, 101-102). Schaffer explained that although he had seen the men who tried to rob him, he was not concentrating on their faces (89, 90, 102). After appellant was taken into custody, everyone got into the car and drove to the City College Security office (103, 135).[6] Mitchell and some other guards took appellant to a separate room where he was thoroughly searched (103-105, 163, 184). Murray, Barcene and another officer questioned him for from ten to twenty-five minutes (165, 207).

When the District Attorney asked Officer Barcene to repeat what appellant had stated to the security officer during the questioning, defense counsel objected and renewed the motion to suppress. The Court denied the motion (224-225). Barcene then testified that after a few minutes of interrogation appellant said he was lucky he got caught because he had mugged people before (221, 226). When asked whether he had mugged students on the Terrace before, appellant replied that he had (227, 230). Although Murray and Mitchell were also present with Barcene, neither officer corroborated Barcene's account (164, 168, 207). The statements were never recorded in written form (232).

Following the interrogation, at about 6:45 p.m., Murray escorted appellant to the police station and handed him over

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6 At trial, the District Attorney showed Schaffer a knife, taken from appellant, which Schaffer stated was similar to the knife which had been used upon him (90-91, 115-116).

to Detective John Sullivan, of the New York City Police Department. Murray told Sullivan about the case and gave him a knife (186-187, 236-238).

Sullivan immediately arrested appellant and gave him his Miranda warnings; when appellant indicated that he understood the warnings (239-240), Sullivan told appellant "why he was placed under arrest, what the guards had told me and I asked him if he wanted to tell me anything" (241) (emphasis supplied). Sullivan then inquired of the identity of the other fellow with appellant when Schaffer was robbed. Appellant answered: "I didn't pull the knife. The other guy did. I didn't know the other guy was going to rob that man;" and that "I just met him in the street" (244).

The questioning took place in the detective room; other people were around, but only Sullivan was involved with appellant (246). Appellant was with Sullivan for an hour, but was only questioned for a couple of minutes (245-246).[7]

C. The Defense

Appellant testified that at about 6:15 p.m., on October 20, 1971, he left home to buy cigarettes, walking north on St. Nicholas Avenue, not St. Nicholas Terrace (264-266). After purchasing the cigarettes at a candy store on the corner of 123rd Street and St. Nicholas Avenue, appellant continued up the Avenue and soon recognized a person who was coming across

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7 Sullivan testifed to appellant's statement by reading from the back of an envelope upon which he had written appellant's statement (241).

the street heading in the same direction. Appellant knew this person by sight from a period of his life when he shot drugs and "hung out" on Eighth Avenue (265-268). The two men walked east on 128th Street for about a minute. Suddenly, appellant heard a car screech to a halt; it was a brown, unmarked vehicle (269-270, 272). Four strange men started running in his direction, and appellant became afraid (271).[8] Both appellant and his acquaintance fled; appellant ran into a building on St. Nicholas Avenue and up five flights of stairs until his chest started to bother him and he sat on the floor (273). When one of the pursuers found him, appellant offered no resistance and he did not attempt to use the knife he had in his pocket (274).[9]

Appellant was handcuffed and thrown into the unmarked car (275-276). Guards Barcene and Washington took appellant into an inner office in the security guards' building where the handcuffs were removed (278-279). Washington asked him who the other dude was and appellant said that he did not know him (280). He kept repeating that he knew nothing (280). Appellant alleged that two of the officers had blackjacks and beat him on the legs (280). Another guard hit appellant as he sat in a chair and knocked him to the floor (182).

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8 Appellant stated he was afraid that the men might be drug dealers after his acquaintance (315).

9 Appellant was employed by his mother as a helper on a delivery truck his brother droye (260). He used a knife on the job to cut the cord which secured the packages (261). The knife he used belonged to him and he carried it to and from the job (262). Appellant admitted that he had carried a knife before he was employed, as did half the population of Harlem (296-297).

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Appellant was in the security guards' building for about twenty minutes to half an hour and was then taken to the police station in handcuffs (283-284). He was brought to Detective Sullivan who advised him that he did not have to answer any questions but did not give him any of the other three warnings (284-285). Appellant gave Sullivan his name and told him where he worked (285). He made no other statement (288-289).

At the close of the defense case, counsel again renewed his motion to suppress the statements made to security officer Barcene (335-337). The Court, finding that the C.C.N.Y. guards were "private persons," refused to order suppression of the statements (338-339).

During his summation to the jury, the District Attorney reminded the jury of appellant's "demeaning" statement that he had held up other students, that he had "been lucky until this one" (373-374). He also repeated appellant's statement to Detective Sullivan, which the District Attorney stated was evidence that appellant was "beginning to prepare his defense" in the police station (374). The jury found appellant guilty of attempted robbery in the first and second degrees.[10]

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10 During its deliberations, the jury asked to see the envelope upon which Sullivan had written appellant's statements. The request was refused, since the item had not been introduced into evidence and instead, Sullivan's testimony was read to the jury (410-411).

On August 29, 1972, the court sentenced appellant to an indeterminate term of fifteen years imprisonment, with a minimum of five years.[11]

The Subsequent Proceedings

Timely notice of appeal was filed, and the conviction was appealed to the Appellate Division, First Department. The issues raised on appeal included "[w]hether, because appellant was not given the Miranda warnings when he was questioned by the college security officers who were public officials engaged in law enforcement, his statement should have been suppressed." (Appellant's Brief on Appeal, p.2).[12] Appellant also argued that the Court unduly restricted examination by denying a full Huntley Hearing examination with respect to officer Sullivan and the C.C.N.Y. security guard (Appellant's Brief at 2).

On March 25, 1974, the Appellate Division remitted the case, in the exercise of discretion, for a hearing on the voluntariness of defendant's statements to officer Sullivan, without ordering such a hearing or reversing with respect to the admissions given to the C.C.N.Y. security officer. The appeal was otherwise held in abeyance.

On April 23, 1974, a new Huntley Hearing was held. The minutes were transmitted to the Appellate Division and the

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11 At sentencing, counsel moved to overturn the verdict citing the statements given to the security officers in violation of Miranda v. Arizona.

12 The Questions Presented to Appellant's Brief in the Appellate Division are annexed hereto as Exhibit C in Appellant's Appendix.

Court, without briefing or argument, affirmed the judgment of conviction on June 26, 1974.

Appellant's application for an order granting leave to appeal to the Court of Appeals was denied by the Honorable Harold A. Stevens, Associate Judge of the Court of Appeals, on November 6, 1974. On November 12, 1974, in response to appellant's motion to reargue, based upon his contention that the case should not be decided without briefing, the Appellate Division granted appellant's motion and then adhered to its order affirming the judgment.

On August 1, 1975, appellant submitted a pro se petition for habeas corpus, alleging the following ground for relief: "[A]n inculpatory statement by petitioner to City College Security officers admitted into evidence when no Miranda warnings were given and the denial of a Huntley Hearing to determine the voluntariness of such statement."

The District Court Decision

On November 19, 1975, Judge Inzer B. Wyatt, of the United States District Court for the Southern District of New York denied appellant's application. After a review of the facts, the Court stated that "it is the burden of the applicant to show that he has exhausted State remedies, and that as appellant had failed to make such a showing, the

ARGUMENT

I

SINCE A SECURITY GUARD FOR THE CITY COLLEGE OF NEW YORK IS A GOVERNMENTAL EMPLOYEE ENGAGED IN LAW ENFORCEMENT WHO IS THEREFORE REQUIRED TO FURNISH MIRANDA WARNINGS BEFORE CONDUCTING CUSTODIAL INTERROGATION, THE ABSENCE OF THOSE WARNINGS MANDATES SUPPRESSION OF APPELLANT'S ADMISSIONS.

A. Appellant's Custodial Statement to the C.C.N.Y. Security Officer Should Have Been Suppressed.

On the night of October 20, 1971, several security officers of the City College of New York arrested appellant on suspicion of attempted robbery. Appellant was immediately handcuffed and placed in custody. After a brief auto ride, the officers ordered appellant into a separate room of the College Security Office and immediately commenced interrogation. During the questioning, which was not preceded by Miranda warnings, an officer obtained appellant's devastating admission that he was "lucky he got caught" because he had previously mugged other people (226). Appellant's statement, made in direct response to a question posed by the security officer, a public employee engaged in law enforcement, should never have been admitted into evidence.

At trial, the security guards testified that they were direct employees of the City College, part of the public

school system of the City of New York. New York Education Law §6202; In the Matter of the Board of Higher Education v. Carter, 14 N.Y. 2d 138 (1964). The College is administered by the Board of Higher Education of the City of New York, which derives its powers from the State Legislature. New York Education Law §§6202, 6203.

Not only were the security guards employees of this body, but they were closely connected to the police department. The officers received instructions from the police, and they were directed to turn over to the police the individuals they arrested. Moreover, there is no question that the function of the officers was that of law enforcement. Their duties were to protect life and property at the City College, the same duties as the police; it was in the course of those duties that they apprehended the alleged culprit.

Despite this welter of evidence proving the Governmental nature of the officers' activity, the trial Court refused to order suppression, finding that since the security guards were not defined by statute as "police officers" or "peace officers," the dictates of Miranda were not applicable. The Court's finding was incomplete, for it is quite possible that the officers were de jure "peace officers" under New York Law. See infra at 19. At any rate, since there is no doubt that the officers were public employees engaged in law enforcement

and therefore required to give Miranda warnings, the Court's finding that the security officials were not de jure police officers is irrelevant.

For it is clear beyond cavil that police officers are not the only public employees required to give Miranda warnings to a suspect in custody. Rather, the test is whether the individual is a public employee or his agent engaged in some aspect of law enforcement. Thus, in Mathis v. United States, 391 U.S. 1 (1968), the Supreme Court held that statements obtained by Government tax agents through interrogation of a suspect in custody on a different charge must be suppressed in the absence of Miranda warnings. Subsequent cases have held, in a variety of circumstances, that Governmental employees, whether or not police officers, are required to act in accordance with Miranda. See, e.g., United States v. Deaton, 468 F.2d 541 (5th Cir. 1972), cert. denied, 410 U.S. 934 (1973) (parole officer required to give Miranda warning to suspect in custody); United States v. De La Cruz, 420 F.2d 1093 (7th Cir. 1970) (customs agent); State v. Graves, 291 A.2d 2 (N.J. 1972) (welfare investigator required to give warnings, but no custodial interrogation in that case).

Indeed, cases have gone so far as to hold that even private citizens are required to afford Miranda warnings where they are acting at the direction of or are closely connected to law enforcement officers. See, e.g., Cranford v. Rodriguez,

512 F.2d 860 (10th Cir. 1975) (foreign police officer acting as agent of U.S. police); Turnef v. State, 512 P.2d 923, 934 (Alaska, 1973) (private investigator working closely with police); People v. Baugh, 311 N.E. 2d 609 (Ill. App. 1974), cert. denied, 421 U.S. 920 (1975) (interrogation by attorney for complainant).

In United States v. Antonelli, 434 F.2d 335 (2d Cir. 1970), this Court clearly indicated its agreement that Miranda warnings are required for public officials or their agents engaged in law enforcement. Thus, in deciding that inculpatory statement made by a suspect while in the custody of civilian security guards employed to safeguard a private pier were admissible notwithstanding the absence of warnings, the Court noted that the "security guards . . . had no pertinent or official connection with any public law enforcement agency," and that "their primary task was to protect the private property on the docks." Id. at 336.[13]

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13 The Court stated that the exclusionary rule of the Fifth Amendment, like that of the Fourth Amendment, has long been construed" 'a restraint upon the activities of sovereign authority' and not as 'a limitation upon other than Governmental agencies.'" Id. at 337 (Citations omitted). Accord, State v. Kelly, 294 A.2d 41 (N.J. 1972).

Cases under the Fourth Amendment, to which Antonelli, supra, turned for support, unequivocally have drawn the line applying the excusionary rule between searches by private individuals and searches by Government officials or their agents, not between searches by "peace officers" and all others. Burdeau v. McDowell, 256 U.S. 465, 475 (1921). See also Camara v. Municipal Court, 387 U.S. 523 (1967); compare United States v. De Berry, 487 F.2d 448 (2d Cir. 1973) ("private" search by carrier, no Governmental action), with United States v. Lopez, 328 F. Supp. 1077, 1101 (E.D.N.Y. 1971) (private airline security officer charged with operating hijacking system is Government agent with respect to that system.)

Comparison between the instant case and Antonelli clearly demonstrates the public nature of the officers' activities. Unlike Antonelli, the guards were employed by a public, not private entity; unlike Antonelli, they received directives from the police; unlike Antonelli, the officers' function was to patrol the streets and protect lives and property at a public institution -- a police function -- rather than to guard exclusively private property. Unlike Antonelli, then, the officers were required to give Miranda warnings, irrespective of whether they were officially designated as "peace officers" under New York C.P.L. §1.20 (33).

Moreover, contrary to the opinion of the State Court and the Court below, there is every indication in this case that the security officers here were de jure "peace officers" as defined by the statutes of New York State, under either of two possible statutory provisions. Thus, the officers here may well have been appointed pursuant to §434a-7.0(e) of the Administrative Code of the City of New York, which provides for the commissioner of police, upon the application of any city or state agency exercising jurisdiction in the city, to appoint special patrolmen for that agency, subject to rules of the police department. The patrolmen possess all the powers and duties of a "peace officer."

The officers here possessed every attribute of a special policeman. They worked closely with the New York City Police Department and, like special policemen, the officers here were required to act in accordance with rules and regulations of the Police Department. Like special police, they were seemingly cloaked with the authority to arrest, and they were required to report any arrest to the police.

The officers might also have been appointed as de jure officers under an entirely separate statutory designation. As already noted, the City University is governed by the Board of Higher Education of the City of New York, which derives its powers from an act of the State Legislature. Education Law §6203. The Board of the City University is granted the same powers as the trustees of the colleges of the State University of New York, unless otherwise specified. Significantly, among the powers of the State University Trustees is the power to "appoint from time to time, special policemen for the State University, who shall be peace officers." New York Education Law §355(m) [Emphasis added].

And, as the Attorney General of New York has noted, a S.U.N.Y. security guard appointed pursuant to this provision is a "peace officer" under State law despite the absence of such an officer in the enumeration of "peace officers" under §1.20(33) of the Criminal Procedure Law, cited by the Court

below. 1971, Opinion of Attorney General at 37-38.[14]

The existence of a provision similar to those of the above-cited Adminstrative Code and Education Law Sections giving the Superintendent of State Police the authority to confer the powers of policemen upon New York Central Railroad Policemen led this Court to rule that railroad officers must give Miranda warnings before conducting custodial interrogation. United States v. Thomas, 396 F.2d 310, 314-315 (2d Cir. 1968). At any rate, regardless of the scheme of appointment, it is abundantly clear that the security officers are required to give Miranda warnings because of their de facto status as law enforcement officers. Indeed, it would be an absurd anomaly to hold that S.U.N.Y. security guards, as "peace officers," are required to give Miranda warnings, but that officers with the same functions at the City University are not. Since the officers were employees of the Government engaged in law enforcement -- be they de jure or

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14 Concededly, the record as to the security officers' statutory authority is unclear. That lack of clarity is due to the failure of both the State Courts and the Court below to hold a hearing on this issue. Accordingly, if the statutory authority for these officers is critical to a determination of whether they were required to give Miranda warnings, the case must be remanded to the District Court for a hearing.

de facto police officers -- the admissions should have been suppressed.[15]

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15 Moreover, it was additional error for the trial court to have failed even to grant a hearing to determine the voluntariness of the statements. Jackson v. Denno, 378 U.S. 368 (1964). Indeed, since the prohibition against receiving coerced confessions has been held to apply in circumstances where Miranda warnings may not be required (See Bram v. United States, 168 U.S. 532 (1897)(questioning by Canadian police officer); United States v. Nagelberg, 434 F.2d 585, 587 n.1 (2d Cir.1970), cert. denied, 401, U.S. 939 (1971); United States v. Robinson, 439 F.2d 553, 561 n.8 (D.C. Cir.1970) (physicians not acting as police agents); Iva Ikuko Toguri D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951)) it was error to fail to hold a hearing -- even if this Court disagrees with our view that the security officers here were required to give Miranda warnings -- particularly in light of appellant's claim that he was beaten by the security officers. See also Cranford v. Rodriguez, 512 F.2d 860 (5th Cir. 1975).

B. Appellant's Subsequent Statement to Officer Sullivan Must be Suppressed as an Illegal Fruit of Appellant's Earlier Admissions to the Security Officer.

Less than fifteen minutes after his admissions to the City College security officer, made without benefit of Miranda warnings, appellant was brought to the police station. Soon thereafter, Sullivan incanted the Miranda warnings to appellant and immediately began interrogation. In the resulting statement, appellant admitted his presence at the scene of the crime, and his possible participation therein: "I didn't pull the knife. The other guy did. I didn't know the other guy was going to rob that man"; "I just met him in the street" (244). This statement, too, should have been suppressed, as it was the direct fruit of appellant's prior and illegally obtained admission to the security guards.[16]

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16 While the precise formulation of this issue was not presented to the District Court, this should not prevent this Court from reviewing it. Stubbs v. Smith, slip. op. p. 2913 No. 75-2124 (2d Cir. April 2, 1976); see, Darr v. Burford, 339 U.S. 200, 203-204 (1950)("To make [habeas corpus] effective for unlettered prisoners without friends or funds, federal courts have long disregarded legalistic requirements in examining applications for the writ and judged the papers by the simple statutory test of whether facts are alleged that entitle the applicant to relief.")

Here, appellant clearly alleged that the initial interrogation was illegal. If he is right, he is entitled to the suppression of all fruits of that illegal interrogation. Furthermore, there is no question that, at least with respect to harmless error, the court considered the admissibility of appellant's statement to Officer Sullivan. Thus, Judge Wyatt specifically ruled that the "independent evidence" apart from any of appellant's statements was overwhelming.

In Westover v. United States, 384 U.S. 436, 496 (1966), the Supreme Court emphasized that the last-minute recitation of Miranda warnings will not insulate a confession from suppression when the confession also followed previous custodial interrogation without benefit of Miranda warnings. Rather, the facts and circumstances must be examined carefully to determine the existence and extent of any causal relationship between the earlier unconstitutional interrogation and the later interrogation following Miranda warnings. United States v. Knight, 395 F.2d 971, 974 (2d Cir. 1968), cert. denied, 395 U.S. 930 (1969); Harney v. United States, 407 F.2d 586, 589 (5th Cir. 1969). The ultimate issue is whether the later authorities were beneficiaries of pressure applied during the earlier, illegal custodial interrogation. Westover v. United States, supra, 384 U.S. at 497; United States v. Knight, supra, 395 F.2d at 974.

Here, there can be no doubt that officer Sullivan was the direct beneficiary of the security officers' illegal custodial interrogation. First, here as in Westover, there was virtually no time lapse between the security guards' interrogation and officer Sullivan's queries; Sullivan's questioning occurred within approxmately fifteen minutes of the prior custodial interrogation. Such an interval was totally insufficient to dissipate the custodial atmosphere created by the security officers, even if appellant's assertion that he was physically abused is disbelieved.

More significantly, the brief and tardy warnings could not have been effective to dissipate the taint of the prior interrogation, because, unlike even Westover, they came after appellant had already made his damaging admissions to the security officer. Fisher v. Scafati, 439 F.2d 307 (1st Cir.), vacated and cert. denied, 403 U.S. 939 (1971); Harney v. United States, supra. Moreover, not only did officer Sullivan make no attempt to dissipate the taint by waiting until the impact of the admissions had subsided, he actually exploited the prior illegal statements. Thus, Sullivan testified that before he questioned appellant, he informed him of "what the guards had told." Sullivan's statement can only be viewed as a clear signal to appellant that Sullivan was fully aware of what had transpired with the security officers, and that any subsequent exercise of appellant's Fifth Amendment rights would be futile. Appellant's admissions were preordained.

In sum, the brief length of time between the interrogations, the fact of appellant's prior admissions and the officer's direct exploitation of the statements compels the conclusion that the statement to Sullivan was the fruit of the earlier illegal interrogation. Accordingly, suppression of the statement is mandated.

C. The Court Below Erred in its Determination that the Admission of Appellant's Statements was Harmless Beyond a Reasonable Doubt.

Without determining appellant's challenge to the statements procured by the officers, the Court below ruled that the admission of appellant's statements, if error, was harmless. We respectfully submit that the Court's decision failed to appreciate both the glaring weaknesses in the People's case, and the extent to which the prosecution and jury relied upon appellant's statements as proof of his guilt.

The fact that the complainant, Jack Schaffer, never identified appellant as one of the men who robbed him left an enormous gap in the People's case. Although Schaffer had considerable exposure to the two culprits -- they asked him for a cigarette, faced him while they pulled a knife, ordered him to go over to a nearby building, backed him against the door of the building, and put the knife away, all this in addition to Schaffer's final glance back after the attempted robbery -- he could not identify appellant just a few minutes later.

Not only was Schaffer unable to identify appellant, but none of the guards recognized appellant by his clothes, facial features, size or shape, as one of the two men on St. Nicholas Terrace. Indeed, the most specific characteristic mentioned by the guards in describing the two men was

their race -- Black -- a fact which would hardly have set them apart from the other residents of Harlem on St. Nicholas Terrace that evening.

In the absense of any reliable identification by Schaffer and the guards, the testimony that Murray and Barcene immediately jumped out of the car, chased and caught appellant is the only testimony upon which the Court below could possibly have relied in its conclusion that the evidence of guilt was "overwhelming." Yet the security guards' testimony that they immediately pursued appellant is directly contradicted by Schaffer, the divinity student who was a frank and credible witness, and whose observations as a victim, rather than bystander, were entitled to substantial weight. Cf. United States ex rel. Phipps v. Follette, 428 F.2d 912, 915 (2d Cir.), cert. denied, 400 U.S. 908 (1970). Schaffer's testimony was that no one got out of the car until the auto had first proceeded down St. Nicholas Terrace, across 127th Street and up St. Nicholas Avenue to 128th Street. (This account is also consistent with appellant's recollection of the point at which the unmarked car screeched to a halt). Thus, according to the complainant, the guards necessarily lost sight of the suspects for several minutes. This fundamental conflict in the People's own case creates a further weakness in the evidence of appellant's guilt, evidence already weak enough given Schaffer's failure to identify appellant as a culprit.

Nor is the People's case aided by Schaffer's testimony that appellant fled when the car bearing the complainant and officers came to a halt. It was perfectly reasonable that appellant would run under these circumstances. He understandably became frightened when a car screeched to a halt and strange individuals jumped out in pursuit. Certainly appellant's flight from these unknown men who made no apparent effort to identify themselves falls far short of establishing the kind of overwhelming evidence calling for an application of harmless error. See, Wong Sun v. United States, 371 U.S. 471, 482 (1963).

Given the weakness of the People's case, it is small wonder that the prosecution placed great emphasis on appellant's purported admissions. In fact, the admissions were the most inculpatory evidence presented by the State. Thus, even in his opening statement, the District Attorney, in an extremely prejudicial manner, told the jury that appellant had made statements to the security officer, but that the jury was only going to be able to hear part of the statements. The statements to the security officer that appellant was lucky and that he had never been caught before, if believed, not only provided an admission of guilt, but an additional admission of prior muggings which could easily have been misused by the jury as evidence of appellant's propensity to commit such crimes. See generally United States v. Puco,

453 F.2d 539, 542 (2d Cir. 1971), cert. denied, 414 U.S. 844 (1973). Moreover, appellant's "exculpatory" statement to Sullivan that he didn't know the other man was going to use a knife provided specific evidence supporting the view that appellant was a participant in the crime.

Furthermore, on summation, the District Attorney emphasized appellant's admission both to the security officer and to officer Sullivan. Finally, the jury evinced their concern on the issue by requesting to see the envelope which Sullivan had used in refreshing his recollection when testifying to appellant's statement. Given the weakness of the People's case and the critical importance of these admissions, the finding of harmless error by the Court below is contradicted by the record. Accordingly, the order of the District Court should be vacated and the writ of habeas corpus should issue

D. Appellant Has Exhausted His State Remedies

Despite the District Court's comment that this pro se litigant had failed to allege that the issues in his petition had been exhausted, the record establishes without doubt that appellant placed his claims before the State Courts. Appellant repeatedly objected to the admission into evidence of the statement to the C.C.N.Y. security guards, and argued that the statements should not have been received in evidence since appellant had not been afforded his Miranda warnings.

Following conviction, appellant appealed to the Appellate Division, First Department, raising the issue of whether "because appellant was not given the Miranda warnings when he was questioned by the College security officers who were public officials engaged in law enforcement, his statement should have been suppressed." (Appellant's Brief on Appeal, p.2). Appellant also urged that a new Huntley Hearing be granted to consider the voluntariness of his statement to the C.C.N.Y. security guard. Following a remand on an unrelated issue and the Court's subsequent affirmance, appellant sought and was denied leave to appeal to the Court of Appeals. Clearly, appellant fairly presented his claim to the State Courts. Thus, there can be no question that he has exhausted his State remedies. Picard v. Connor, 404 U.S. 270, 275 (1971).

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE WRIT OF HABEAS CORPUS SHOULD BE GRANTED, AND APPELLANT'S STATEMENT TO THE SECURITY GUARD AND POLICE ORDERED SUPPRESSED. IN THE ALTERNATIVE, THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR A HEARING ON APPELLANT'S APPLICATION.

Respectfully submitted,

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CERTIFICATE OF SERVICE

May 17, 1976

I certify that a copy of this CORRECTED brief ~~and appendix~~ has been mailed to the Attorney General of the State of New York.

Edward J. Gotfried